IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 399

EDGAR H. SMITH, JR., *Petitioner,*

v.

HOWARD YEAGER, WARDEN, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF OF PETITIONER

The State of New Jersey fails to rebut *with reasons* each of the three arguments presented.

QUESTION ONE—*Massiah's* Retroactivity

The State insists that the post-indictment admission it deceptively elicited from petitioner was no more than an acknowledgment that the stenographer had been "accurate" in transcribing the prior confession. But

that ignores *the use* made of the "accuracy" admission at trial. Since the jury was permitted to consider the "accuracy" statement in assessing the "weight and credibility" of the prior confession (T. 963, Pet. 7, 13), the statement was *used* against Smith, not merely to show that he had verified the transcription, but to prove that he had reconfirmed the truth-content of the confession. In short, it was used as a second confession.[1]

Assuming that view of the "accuracy" admission, the State does not dispute that *Massiah* was violated, but contests only its application on retroactive collateral attack. It implicitly acknowledges that this Court, in *McLeod* v. *Ohio*, 381 U.S. 356 (1965) has already distinguished *Massiah* from *Escobedo* and *Miranda* by applying *Massiah* to pending appeals.[2]

But the State offers not a single reason for denying full retroactivity. Although New Jersey repeats, in abstract terms, the *Linkletter* categories to be considered, it fails to analyze the applicability of the categories to *Massiah* in particular. For example, with

---

[1] Likewise beside the point is the State's argument that the first confession might have been admissible without the later "accuracy" admission. The point is not what "accuracy" might have meant, or how the first confession might have been admitted, but how the "accuracy" statement was, in fact, used at trial.

[2] The State's only lower court citations, *Romano* v. *Fay*, 360 F.2d 389 (2d Cir. 1966) and *Lyles* v. *Beto*, 363 F.2d 503 (5th Cir. 1966) are therefore unavailing since neither opinion acknowledged even the existence of *McLeod*, and *Romano* "does not involve a confession." 360 F.2d at 398.

Notably, this Court has re-emphasized again this Term, for retroactivity purposes, the "distinction drawn between the right to counsel cases [e.g., *Massiah*] and those arising under the Fourth and Fifth Amendments . . . ." [e.g., *Miranda*]. *Arsenault* v. *Massachusetts* No. 187 Misc., decided October 14, 1968.

respect to the impact of retroactivity on the "administration of justice", it does not rebut that post-indictment interrogations are rare, and that less than ten reported cases have presented retroactive *Massiah* violations. (Pet. 16-17). And in a case in which a comment on the "accuracy" of a transcription was twisted for use at trial as a second confession, the State would have this Court believe that "the very integrity of the fact-finding process" *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965) was left unaffected!

QUESTION TWO—The "Waiver" of a *Townsend* Hearing

In 1961, prior to the development in *Townsend* v. *Sain*, 372 U.S. 293 (1963) of the right to a habeas hearing,[3] petitioner's first habeas court and his counsel made comments that allegedly constituted a "waiver" of that right. The State's response here, however, does not dispute:

1. That the expanded "right to a hearing" was then unknown. (Pet. 18).

2. That the alleged "waiver" remarks of court and counsel were made three weeks apart from each other. (Pet. 19).

3. That the habeas judge never explicitly offered a hearing, but instead was expressing concern for "the state of the record" in terms of the completeness of the papers filed. (Pet. 19-20).

4. That petitioner's present habeas petition states allegations in a degree of detail that would have been unavailing prior to *Townsend*.

---

[3] Apparently, New Jersey is still under the impression that habeas hearings are entirely discretionary (Br. in Opp. 19), despite *Townsend's* "mandatory" categories.

5. That the "voluntariness hearing" conducted at trial was conducted unconstitutionally in the presence of the jury, (*Sims* v. *Georgia*, 385 U.S. 538 (1967)), by inadequately prepared trial counsel who was belated in his attack on voluntariness and then virtually failed to conduct any cross-examination. (Pet. 24-25).

6. That petitioner never personally consented to the alleged "waiver". (Pet. 23).

These undisputed facts are utterly inconsistent with this Court's teachings on the validity of a "waiver". *Johnson* v. *Zerbst*, 304 U.S. 458, 464-66 (1938); *Fay* v. *Noia*, 372 U.S. 391 (1963).

QUESTION THREE—Involuntariness on the Existing State Court Record

The State attempts to distinguish *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968) by noting:

1. Greenwald was taking medication but had none during his detention. But Greenwald

> "himself testified that at no time between his arrest and his confession did he express to anyone a desire for food or medication." 390 U.S. at 522.

Moreover, Smith too was ill (T. 541) and consequently could eat only two eggs and cups of coffee during the 35 sleepless hours that culminated in his 13 hour night long detention.

2. Greenwald, interrogated after *Escobedo*, requested a lawyer. But unlike petitioner Smith, he was "by no means a stranger to the criminal law". 390 U.S. at 521. Moreover, petitioner has consistently alleged a request in his *pro se* habeas applications even before *Escobedo* highlighted its legal significance. (Pet. 22, Pet. App. 152). The State, however, has never responded to this or any other of Smith's habeas allega-

tions. In all the years of litigation, it has done no more than baldly oppose an evidentiary hearing. Its assertion that there was no request is therefore ironically typical of its characterization of what "the record shows".[4] (Br. in Opp. 21, 28).

This Court need not order an evidentiary hearing, however, for New Jersey does not and cannot rebut that in virtually every relevant detail *Greenwald* and *Smith* are as much on all fours as two cases are ever likely to be:

	Greenwald	*Smith*
Time of arrest	10:45 p.m.	11:30 p.m.
Total detention prior to confession	12¾ hrs.	13 hrs.
Physical condition	Taking medicine	Ill and cold
Warnings	None	None
Sleepless hours	At least 13	35 (in bed for two hrs. prior to arrest)
Last meal	4:00 p.m., prior to arrest	Morning before arrest
Detention food	None	2 eggs an cups of coffee
Promises or threats	None	Disputed
Number of Interrogators	"Several at a time"	More than 12
Early morning detention events	Line-up	Doctor's exam, hair & nail sample taken

Moreover, the State also ignores the features of Smith's interrogation that made it even more coercive than Greenwald's:

1. Greenwald was left alone to sleep from 2 a.m. until the morning. Petitioner Smith was taken from

[4] Likewise the record does not show that petitioner "(1) was alert and had sufficient rest; (2) had sufficient food; (3) wasn't continually questioned or harassed; (4) that no promise or threats were made to him by the police or prosecutors". (Br. in Opp. 21). The record plainly refutes the first three of these assertions and the fourth is the subject of another habeas allegation that the State has consistently refused to test in any court.

place to place and questioned from time to time throughout the night by different teams of officials.

2. Greenwald, but not Smith, testified that he was fully aware of his rights to silence and counsel.

3. In Smith's case, hours prior to the confession, the most damaging evidence against him, more than ample for arraignment, had already been obtained. (Pet. 6).

Finally, petitioner's case, although well within the *Greenwald* holding, does not necessarily rest upon that alone. (See chart, Pet. 26). The State responds to petitioner's comparison chart only by isolating single factors present in certain of this Court's cases that are not present here. Petitioner does not contend that his case is fully congruent with each of the cases presented in the chart. His was, however, an interrogation in which the "totality of the circumstances", see *Clewis* v. *Texas*, 386 U.S. 707 (1967) manifests an overreaching no less coercive than those that have compelled this Court to reverse in the past.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
1000 Hill Building
Washington, D. C. 20006
Attorneys for Petitioner

Of Counsel:

STEPHEN F. LICHTENSTEIN
505 Broad Street Bank
Building
Trenton, New Jersey